

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Action of 1991)	GC Docket No. 02-278
)	
Petition of YouMail, Inc. for Expedited)	
Declaratory Ruling that YouMail's Service)	
Does Not Violate the TCPA)	

COMMENTS OF CALLFIRE, INC.

CallFire, Inc. ("CallFire") by its counsel hereby files comments in response to the Federal Communication Commission's ("FCC's" or "Commission's") Public Notice in the above-captioned proceeding.¹

I. INTRODUCTION AND SUMMARY

CallFire supports grant of YouMail, Inc.'s ("YouMail's") Petition, particularly YouMail's request that the Commission clarify that software platform providers (such as YouMail, CallFire, and others) do not "initiate" calls within the meaning of the Telecommunications Consumer Protection Act ("TCPA").² Rather, the business or consumer utilizing the software is the call initiator, maker, and sender under the TCPA.

In furtherance of this request, CallFire first describes its services and new innovations being brought to market by CallFire and others offering Software as a Service and Platforms as a Service (collectively "Platform Providers") to business of all sizes throughout the nation. Next, CallFire demonstrates that Platform Providers do not "initiate," "make," or "send"

¹ *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from YouMail, Inc.*, Public Notice, DA 13-1433 (June 25, 2103) ("Public Notice").

² Petition at 9-10.

voice or SMS “calls” within the meaning of the TCPA. Rather the Platform Providers’ customers are the call initiators, makers, and senders under the TCPA. Finally, CallFire shows that grant of the relief requested in the YouMail Petition – and in other similar petitions pending – will serve the public interest by promoting innovation without risking any loss in consumer protection.

II. CALLFIRE’S SERVICES AND INNOVATIONS

CallFire is a Santa Monica, California-based cloud communications company that provides software-based platform services and Application Program Interfaces (“APIs”) to a wide array of businesses, schools, non-profits, membership organizations and governmental entities. Over 100,000 groups, including Pepsi Co., AllState, the University of Michigan, the Boy Scouts of America, and the Saddleback Church, utilize CallFire’s services to engage their customers, constituents, and members.

CallFire provides a suite of applications that enable entities to scale their communications needs to reach constituents in the most efficient means possible without the need for substantial sunk-cost investment. Entities utilizing CallFire have complete control over their communications. Among other applications, a CallFire customer may utilize:

- Voice Broadcast to transmit pre-recorded messages regarding events, such as school closings, weather emergencies, renewal notices, missed deadlines, potential fraud alerts, and promotions;
- Text messaging for appointment scheduling/modifications, news alerts, account activity, receipt transmittal, and promotions;
- Hosted IVR to act as a “virtual receptionist” for inbound call routing or as a means of conducting consumer satisfactions survey; and

- Cloud Call Center to give small organizations the same capability as large call centers to reach constituents in the most efficient way possible.

When utilizing CallFire's outbound applications, CallFire's customers create their own calling lists and destinations, and control completely the telephone numbers dialed, the message delivered, the time of day of the message, and the frequency of communications.

Customers have the option of utilizing CallFire's software platform or APIs, or both at their election. CallFire's software platform provides customer with a simple, web-based system to manage their communications needs. Customers create a CallFire account and then utilize any of CallFire's applications to communicate with their constituents. With CallFire's APIs, application developers are able to integrate voice and SMS features into their own software systems or applications. In either case, CallFire is connected with carriers for the proper routing and delivery of the customer communications to the appropriate destination.

CallFire takes consumer protection and legal compliance very seriously. CallFire has implemented a series of protections to identify potential bad actors before they can even activate a CallFire account. CallFire provides substantial education to customers on their obligations under federal law, such as the TCPA, Do Not Call, and the Telemarketing Sales Rule. Moreover, CallFire proactively monitors its customer's actions in an effort to identify potential misuse of CallFire's technology, and CallFire suspends and investigates suspicious account activity and ultimately terminates any customer found to be misusing CallFire's offerings.

At bottom, CallFire recognizes that strong consumer protection benefits CallFire and its customers by eliminating or at least minimizing inappropriate and potentially unlawful

communications with consumers. The industry and technology continues to evolve rapidly, and CallFire is constantly seeking to improve its processes to offer the best possible experience to CallFire's customers and to consumers.

II. PLATFORM PROVIDERS, SUCH AS YOUMAIL AND CALLFIRE, DO NOT “MAKE,” “INITIATE,” OR SEND VOICE OR SMS “CALLS” WITHIN THE MEANING OF THE TCPA

Under existing Commission precedent, Platform Providers – like to common carriers and fax broadcasters – do not “make,” “initiate,” or otherwise “send” communications to consumers. Rather, Platform Providers operate as intermediate conduits, and should be recognized by the Commission as such. In various forms, these issues have been pending before the Commission since at least 2009.³ Moreover, at least one federal district court has issued a primary jurisdiction referral to the Commission on similar issues.⁴ Like YouMail, Club Texting, GroupMe, Twilio, and others, CallFire “has been the target of ruinous class action lawsuits”⁵ by plaintiff's lawyers seeking to profit from purported class action litigation. The Commission should clarify matters by granting YouMail's Petition – and those pending by Club Texting,

³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Club Texting, Inc. Petition for Declaratory Ruling that Text Broadcasters Are Not “Senders” of Text Messages Under § 227(b)(1) of the Telephone Consumer Protection Act*, Petition for Declaratory Ruling, CC Docket No. 02-278 (filed Aug. 25, 2009).

⁴ *Brian Glauser v. Twilio, Inc. and GroupMe, Inc.*, NO. 4:11-cv-02584-PJH, (NDCA), Order Granting Motions to Stay, Dkt. No. 73 (filed Jan. 27, 2012). On January 27, 2012, the Court granted the separate motions of GroupMe and Twilio to stay this case pursuant to the primary jurisdiction doctrine. Order Granting Motions to Stay, Dkt. No. 73, at 1, 3 (filed Jan. 27, 2012). The Court stayed the action so that the FCC could complete two proceedings considering three “potentially dispositive issues,” i.e., what qualifies as an auto-dialer subject to the TCPA; requirements for obtaining prior express consent under the TCPA; and the applicability of any “common carrier” exemption to a text message service provider under the TCPA. Shortly thereafter, GroupMe filed a petition for declaratory ruling with the Commission, which remains pending.

⁵ YouMail Petition at i.

GroupMe, and Twilio – to clarify that intermediary Platform Providers do not have TCPA liability, just like fax broadcasters and common carriers.

Since the inception of the TCPA in 1991, the Commission has utilized common carrier principles for enforcing the TCPA. In its 1992 implementing order, the Commission recognized that providers of fax transmission services are not liable for sending unsolicited fax advertisements “[i]n the absence of a ‘high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmission.’”⁶ The Commission later clarified that its rules impose liability for unsolicited fax advertisements upon the party whose behalf they are sent, while exempting “fax broadcasters” that act as a conduit providing the faxing capability and transmission services.

In 1995, the Commission reiterated this point, making clear that TCPA liability for unsolicited fax advertisements attached to the party upon whose behalf the faxes were transmitted. The Commission exempted “fax broadcasters”:

We clarify that the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements, and that fax broadcasters are not liable for compliance with this rule. This interpretation is consistent with the TCPA’s legislative history, and with our finding in the Report and Order that carriers will not be held liable for the transmission of a prohibited message.⁷

Thus, the Commission has always exempted from TCPA liability intermediate providers, like YouMail and CallFire, charged with transmitting messages created and directed by their customers to other consumers.

⁶ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 F.C.C.R. 8752, 8780 (quoting *Use of Common Carriers*, Report and Order, 2 F.C.C.R., 2819, 2820 (1987) (“*Use of Common Carriers*”)).

⁷ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, 10 F.C.C.R. 12391, 1407 (1995 (“*1995 TCPA Order*”)).

This longstanding and faithfully followed interpretation of the TCPA is grounded in the Commission’s common carriage principles. In *Use of Common Carriers*, for example, the Commission stated that multipoint distribution service (“MDS”) common carriers “will not generally be liable for the illegal transmission [of obscene materials] unless it can be shown that they knowingly we involved in transmitting the unlawful materials.”⁸ As the Commission explained, its approach avoided forcing common carriers to endure the “uncertain predicament” of closely monitoring the content of the material sent by their clients.⁹ Such “uncertainty and expense are clearly not in the public interests” because the burden would interfere with the ability of common carriers to offer transmission services to the many senders of lawful communications.¹⁰ The exact same concerns warrant grant of the YouMail Petition.

Aside from the fact that they use new and innovative technology, companies like YouMail, CallFire, and Platform Providers act in all material respects like common carriers and fax broadcasters – entities that are exempt from TCPA liability. Platform Providers are “person[s] or entit[ies] that transmit[] messages to [phones] on behalf of another person or entity for a fee.”¹¹ And the clients served by companies, such as YouMail and CallFire, are the “senders” – i.e., they are “person[s] or entit[ies] on whose behalf a [communication] is sent or whose goods or services are advertised or promoted in the unsolicited [communication].”¹² The straightforward applicability of these definitions to platform providers and their customers

⁸ *Use of Common Carriers*, 2 F.C.C.R. at 2820.

⁹ *Id.*

¹⁰ *Id.*

¹¹ 47 C.F.R. § 64.1200(f)(6).

¹² *Id.* at § 64.1200(f)(8).

compels a finding of equivalent treatment for TCPA liability. That is, platform providers should not have any more TCPA liability than fax broadcasters or common carriers.

III. GRANT OF YOUMAIL’S PETITION – AND THE SIMILAR PETITIONS PENDING – WILL SERVE THE PUBLIC INTEREST BY PROMOTING INNOVATION WITHOUT RISKING ANY LOSS IN CONSUMER PROTECTION

At present, platform providers are facing an “uncertain predicament” regarding potential TCPA liability caused by their customers. Just as the in the case fax broadcasters and common carriers, this “uncertainty and expense are clearly not in the public interests.” Indeed, the cost of defending meritless class action lawsuits based on distorted TCPA theories risks stifling innovation by technology companies based on the action a small subset of their customers. The risk of TCPA class action law suits is chilling investment for Platform Providers and risking stagnation in innovation. The Commission should grant YouMail’s Petition as a means of providing certain to the industry and confidence to investors.

In addition to promoting innovation and investment, grant of YouMail’s Petition and treating platform providers akin to fax broadcasters or common carriers would serve the public interest and the goals of the TCPA. TCPA liability would continue to exist on business utilizing platform services as a conduit – these are the entities “in the best position to ensure that recipients have consented to receive [communications].”¹³ Platform Providers would still be subject to appropriate third-party discovery in cases where they hold in their possession information relevant to a dispute between the content creator and the consumer receiving the message or call. Thus, consistent with the Commission’s traditional “focus[] on the nature of an

¹³ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 F.C.C.R. 1401, 14131 (2003) (“*2003 TCPA Order*”).

entity's activity rather than on any label that they entity may claim,"¹⁴ Platform Providers, like fax broadcasters, would avoid TCPA liability only to the extent they act as a conduit provider offering transmission services.

Application of the Commission's rules could continue to provide for TCPA liability in cases where the Platform Provider "demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such transmission."¹⁵ As with fax broadcasters, this standard would impose liability upon platform providers that "determine the content of the ... message" or is engaged in "any other close involvement."¹⁶ Accordingly the result of granting the relief requested would be wholly consistent with the Commission's long-standing and reasonable interpretation of the TCPA.

IV. CONCLUSION

Consistent with the foregoing, the Commission should grant YouMail's Petition and clarify that Platform Providers are akin to fax broadcasters and common carriers, and accordingly have no TCPA liability for the actions of their customers.

Respectfully submitted

/s/

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July 25, 2013

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¹⁴ *Id.*

¹⁵ *Id.* 47 C.F.R. § 64.1200(a)(3)(iv).

¹⁶ 2003 TCPA Order, 18 F.C.C.R. 14131.